**IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL**

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 1774/01

Naru Dhami

Versus

State

Date of decision: 25.11.2004

For the Approval of:-

Hon'ble Mr. Justice J.C.S. Rawat

- Whether the order/judgment should be sent to the reporters for reporting?

(Yes)

- Whether the reporters be allowed to see the judgment?

(Yes)

Dated: 25.11.2004
LSR

**IN THE HIGH COURT OF UTTARANCHAL**

**AT NAINITAL**

**CRIMINAL APPEAL NO.1774 OF 2001**

Naru Dhami S/o Goria Dhami
R/o village. Danda Panchait, Gudu Khati,
District Bajro Bhatari-Anchal Sethi (Nepal)
Presently: House of Shanker Lal Sah near Guru Dwara
Gail, Bagnath, Bageshwar, district Bageshwar

Appellant.

Versus

State of Uttaranchal ---------- Opposite Party.

Ms. R.S. Sambhal and Mr. I.S. Mehra learned counsel for the appellant.
Mr. H.C. Pandey learned A.G.A. for the State.

**Hon'ble J.C.S. Rawat, J.**

**1.** This is a criminal appeal preferred by appellant Naru Dhami against the judgment and order dated 25.07.2001 passed by Sri R.K. Singh, the then Sessions Judge Bageshwar by which he convicted the appellant u/s 20 (b) of Narcotic Drugs and Psychotropic Substance Act, 1985 (for the short 'NDPS Act') and sentenced him for 10 years rigorous imprisonment and a fine of Rs. one Lac. In default of payment of fine the appellant shall undergo one-year imprisonment.

**2.** Briefly stated the prosecution case is that on 04.02-2000 S.S.I. Hirendra Singh Bist (PW-1) alongwith S.I. Mahesh Kumar Lakhera (PW2), Head Constable Rampal of P.S. Bageshwar were on patrol duty. When they reached Kayur Bazar constable Devendra Panwar (PW3) informed that one person was to come from Gurdwara lane carrying Charas. Believing this the police party tried to procure public witnesses but none was ready to give evidence. The police person took their personal search but nothing incriminating was found. They waited for that person in Gurdwara lane. One person was seen coming from that

Gali. Constable Devendra Panwar (PW3) pointed the appellant who was coming from the Gali. Seeing the police he tried to ran away. He was apprehended. On being asked he told his name Nuru Dhami. He told that he had Charas. On asking whether he wanted to be searched before a Gazetted Officer or a Magistrate, the appellant stated that the police party might take the search. On search 200 grams of Charas was recovered covering with polythene. The appellant could not show any license for the same. The recovered article was sealed in a bundle. Recovery memo (Ex.Ka1) was prepared and a copy was supplied to the appellant. The appellant and the recovered article were brought to the police station where F.I.R. (Ex.Ka.2) was recorded on the same day at 07:30 p.m. and a case u/s 21/22 N.D.P.S. Act was registered against the appellant and an entry (Ex.Ka 3) was made in G.D. The Investigating Officer Thakur Singh Adhikari (PW4) prepared site plan (Ex.Ka6) and after competing the formalities of investigation submitted charge sheet (Ex. Ka-5) against the appellant.

**3.** Charge was framed against the appellant U/s 20(b) read with section 22 NDPS Act to which he pleaded not guilty and claimed to be tried.

**4.** The prosecution in support of its case examined PW1 S.S.I. Harendra Singh Bist who was the head of the police party and proved recovery memo Ex Ka 1. PW2 Mahesh Kumar Lakhera was also the member of the police party, PW3 Devendra Panwar is the informant, PW3 S.S.I. Thakur Singh Adhikari investigated the case, proved FIR Ex.Ka2, site plan Ex.Ka3, Charge Sheet Ex.Ka5, Ex.Ka6, report of chemical examiner and Ex.Ka7, letter to Chemical Examiner. PW5 Virendra Singh proved Ex.Ka6, report

of chemical examiner and Ex.Ka7, letter to Chemical Examiner.

**5.** The appellant in his statement U/s 313 Cr.P.C. denied the prosecution allegations. He further stated that he was arrested at 09.00 p.m. from the bridge of Gomti river and was kept in police lock up for 3 days. He did not pay Rs. 5000/- to the police so he has been falsely implicated in this case.

**6.** On appreciation of evidence on record the learned trial court found the appellant guilty 20 (b) N.D.P.S. Act and convicted and sentenced the appellant as above.

**7.** I have heard the learned counsel for the parties and perused the evidence on recode.

**8.** It was contended on behalf of the appellant that S.S.I. Harendra Singh Bist (PW1) has not recorded the information given by constable Devendra Panwar (PW-3) with regard to appellant's involvement before proceeding to arrest of the appellant in this case. It was further contended that this constitutes violation of section 42 of NDPS Act. It is true that u/s 42(1) of NDPS Act the officer concerned when he has reason to believe from his personal knowledge or information received from any person is obliged to take it down in writing. If such information constitutes an offence punishable under chapter IV of NDPS Act and he sends it forthwith to his superior officer. It was further contended that PW-1 Harendra Singh Bist after receiving the said information had not communicated it to his superior officer which constitutes violation of section 42. In constituting any fact to find out whether the prosecution has complied with the mandate of any provision which is mandatory, it has to be examined with a pragmatic approach. It has been held in **Sajan Ibraham v. State of Kerala, 2001 Supreme Court**

**Cases (Cri.) 1277** that in this case PW-3 head constable got information at about 7:00 p.m. that the appellant was selling injectable Narcotic drugs at a particular place. When he proceeded for the police station to give this information to his immediate superior S.I. of police, PW-5, he found PW-5 along with his police party, who were on patrol duty coming, hence the said information was communicated there by PW-3 to PW-5. Thereafter, PW-5 along with his police party and PW-3 immediately proceeded towards the place where the appellant was standing and apprehended him. It was contended that PW-5, the officer concerned, had not recorded the information given by PW-3 with respect to the accused appellant's involvement before proceeding to arrest him and that he after receiving the said information had not communicated it to his immediate superior which constituted violation of section 42. Rejecting the contention, the Supreme Court held that PW-5 could not have recorded the information given by PW-3 and communicated to his superior while he was on motion, on patrol duty, in the jeap before proceeding to apprehend him. Had they not acted immediately, the appellant would have escaped. On these facts, no inference could be drawn that there has been any violation of section 42 of the Act.

**9-** In the case in hand PW-3 Devendra Pawar got information with respect to the appellant that he was in possession of Charas and he was to arrive at a particular place. He immediately proceeded to the police station to give this information to the officer in-charge of police station. The officer in-charge was not available at the police station. As soon as he went to the Bridge of Saryu River where he was in search of

station officer, the station officer PW-1 met him at the Bridge of Saryu River who was on patrol duty. The information was communicated by PW-3 Devendra Kumar to PW-1 Harendra Singh Bsit. Thereafter PW-1 Harendra Singh Bist alongwith police party proceeded to the place where the appellant was to arrive. Had they not done so immediately, the opportunity of seizure and arrest of the appellant would have been lost. How PW-1 Harendra Singh Bist could have recorded the information given by PW-3 Devendra Pawar and communicated to his superior officer while he was, on motion, on patrol duty before proceeding to apprehend him was not probable. If the police party had not acted immediately the appellant would have made his escape good. The learned counsel for the defence also submitted that PW-3 Devendra Pawar has stated in his evidence that he had an information that the appellant was involved in carrying some contraband and he was behind the appellant for the last seven days. The learned counsel for the defence further submitted that PW-3 Devendra Pawar was not attached with the concerned police station but he was on emergency duty in the police line. It was further contended that the constable PW3 was watching activity of the appellant then he should have reported the matter to the officer in-charge of the police station. Learned AGA refuted the contention. The evidence of PW-1 Harendra Singh Bist, PW-2 Mahesh Kumar Lakhera and PW-3 Devendra Pawar reveal that the information by the constable PW-3 was only given at 5:30 p.m. to PW-1 Harendra Singh Bist and the appellant was apprehended at 6:15 p.m. on 04-02-2000. Thus the station officer only on 04-02-2000 received the information at 5:30 p.m. Prior to that the

station officer had no information with regard to the possession of the contraband with the appellant. PW-3 Devendra Pawar have also no knowledge or he was not sure that the appellant was actually in possession of the contraband. When PW-3 Devendra Pawar became confident with regard to the possession of the contraband with the appellant then he informed the station officer. Thus the contention of the learned counsel for the defence has no force.

**10-** It was further contended by the defence counsel that the requirement of section 57 of NDPS Act was not complied with inasmuch as the full report of arrest and seizure was not sent to the superior officer within 48 hours of the arrest.

**11-** It has been held in ***State of Punjab v. Balbir Singh, (1994)3 Supreme Court cases 299*** that sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar provisions are also there in the Cr.P.C. If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial

or the conviction if otherwise there is sufficient material. Therefore it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totality ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

**12-** In **Rangi Ram v. State of Haryana, JT 2000 (5) SC 494,** it has been held as under:-

> "The High Court after re-appreciating the evidence agreed with the findings recorded by the trial court and confirmed the conviction and sentence of the appellant. It was submitted by the learned counsel appearing for the appellant that in this case requirement of section 52 was not complied with inasmuch as the accused and the seized articles were not forwarded to the officer empowered under section 53 of the Act. We find no substance in this submission because the person who had arrested the appellant and seized the articles was himself and officer-in-charge of the nearest police station. It was also contended that the requirement of section 57 was not complied with inasmuch as no full report of the particulars of arrest and seizure was made by the Sub-Inspector Ram Kishan to his superior officer. It is true that there is no positive evidence on record to show that such a report was made. But it is also true that in cross-examination of the

witness not a single question was put to find out whether he had made any report to his superior officer or not. There is no material on record, which would indicate that this provision was not complied with. Moreover, as pointed out by the High Court this provision is not mandatory. Hence, its non-compliance by itself cannot vitiate the conviction of the appellant."

**13.** Thus, in view of the above observations it has to be seen whether any prejudice has been caused to the appellant or not. The learned defence counsel has not shown that the appellant has been prejudiced by such non-compliance.

**14.** In the case in hand there is no positive evidence on record to show that such report was made. But in the cross-examination of the witnesses not a single question was put to find out whether the arresting officer had made any report to his superior officer or not. The appellant was produced before the Magistrate concerned on the next day along with all relevant documents but the production of the appellant along with relevant papers would not be deemed that a report was sent to his superior officer because the word 'his superior officer' means the officer superior to the officer-in-charge, meaning thereby 'Circle Officer' and 'S.P.'

**15-** It was contended on behalf of the defence that no public witness of the arrest and seizure was taken and this aspect of the matter also creates doubt in the prosecution version and the evidence. This submission has no force because all the three witnesses, PW-1 Harendra Singh Bist, PW-2 Mahesh Kumar Lakhera and PW-3 Devendra Pawar have categorically stated that despite effects no public witness could be procured at

the time of arrest and seizure. There is nothing in their evidence which may in any way assail their credibility. The prosecution has proved beyond any doubt the fact of recovery of contraband from the possession of the appellant at the time of arrest at 6:15 p.m. on 04-02-2000.

**16-** The learned counsel for the defence further assailed the findings of the learned trial court and submitted that the mandatory provisions of section 50 of NDPS Act have not been complied with. The learned defence counsel also drew my attention to the principles of law laid down by the constitutional Bench of Hon'ble Supreme Court in the case of **State of Punjab v. Baldev Singh ETC, 1999 CAR 370**. It was further contended that the recovery of the contraband was made in Bageshwar, which is district Headquarter and the Gazetted Officers and the Magistrates are available. The police could have procured the presence of a Gazetted Officer or a Magistrate at the spot. But the police did not procure the presence of a Gazetted Officer or a Magistrate, which creates doubt in the prosecution version, and the evidence of the witnesses with regard to the arrest and search. Having considered the import of the reported decision as indicated above and in the light of the material on record I find no merit in the argument of the learned defence counsel. The reason is that it has been mentioned in the memo of arrest and seizure that the appellant himself on being apprehended told that he was possessed of Charas and therefore was not wiling to be searched before a Gazetted Officer or a Magistrate and offered himself to be searched by the members of the arresting party. The witnesses have categorically stated that the police party informed the

appellant of his valuable rights being searched before a Gazatted Officer or a Magistrate. But the appellant declined that the search might be made before a Gazetted Officer or a Magistrate. He also claimed that his search be made by the police party itself. This fact having been proved by the prosecution in evidence and there is nothing in their evidence as may in any way assail their reliability. Thus the prosecution has proved by cogent evidence that the compliance of mandatory provisions of the section 50 of NDPS Act has been made.

**17-** It was contended on behalf of the defence that the prosecution has adduced the evidence that 200 grams of Charas was recovered from the possession of the appellant and the same was sent to the Chemical Examiner and the Chemical Examiner found that the contraband was 180 grams. The learned defence counsel further submitted that there is a discrepancy in the weight of the recovered contraband. The learned AGA refuted the contention and contended that Charas is such contraband which can be reduced in weight due to lapse of time as it may dry after lapse of time which reduces the weight of the Charas. The perusal of the record reveal that the prosecution witnesses have stated in their evidence that the contraband recovered from the possession of the appellant was not weighed at the spot. Thus the prosecution evidence clearly reveals that the exact weight was not taken at the spot. When it was sent to the Chemical Examiner it was found that it was 180 grams. This discrepancy does not affect the prosecution version. The argument of the learned defence counsel is not sustainable.

**18-** The learned defence counsel further submitted that the prosecution has failed as to how the sample of

the contraband was taken from the sealed bundle. The learned AGA refuted the contention. The prosecution has proved by cogent evidence that the appellant was arrested on the spot. The contraband was sealed on the spot and it was deposited in the Malkhana. Constable PW-5 Virendra Singh has clearly stated in his cross-examination that the contraband was brought before the court where the seal was compared. Thereafter the seal of the contraband was opened before the court and was again sealed before the court and then it was sent to Malkhana. Later on it was sent to the Chemical Examiner. It is amply proved that the said contraband was sent to the Chemical Examiner and it was found Charas. The contention of learned defence counsel is not sustainable.

**19.** In view of the above discussion, I am of view that the learned trial court has rightly found the appellant guilty u/s 20 (b) of the NDPS Act and no interference need to be required by this court. The conviction and sentence awarded by the trial court are maintained. The appeal lacks merit and is dismissed.

**20.** Let a copy of this judgment alongwith the record of the case be sent to the trial court for needful compliance under intimation to this court within two months positively.

**(J. C. S. Rawat, J.)**

NOVEMBER 25, 2004